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No. 90-762

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS FREYTAG, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a special trial judge of the Tax Court could be assigned to hear and report on petitioners' cases under 26 U.S.C. 7443A(b)(4).

2. Whether petitioners' consent to have their cases heard by a special trial judge waived their right to challenge his appointment on the basis of the Appointments Clause, Art. II, § 2, Cl. 2.

3. Whether the duties of a special trial judge in hearing and reporting on a case may be performed only by an "Officer of the United States," and, if so, whether the appointment of special trial judges by the chief judge of the Tax Court, in accordance with 26 U.S.C. 7443A, satisfies the requirements of the Appointments Clause.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A13, is reported at 904 F.2d 1011. The opinion of the United States Tax Court, Pet. App. A14-A69, is reported at 89 T.C. 849.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1990. A petition for rehearing was denied on August 15, 1990. Pet. App. A97-A98. The petition for a writ of certiorari was filed on November 13, 1990, and granted on January 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in an Appendix to this brief.

STATEMENT

Petitioners attempted to deduct on their income tax returns large "losses" supposedly incurred as a result of their participation in a tax shelter scheme. When the Commissioner of Internal Revenue disallowed those deductions, petitioners filed petitions in the Tax Court. Trial began before a regular judge of the Tax Court,[1] but that judge became ill shortly after trial began. A special trial judge[2] was assigned to complete the trial, which was videotaped so that the regular judge could view the testimony and ultimately render the decisions.

After all the evidence was taken, however, the regular judge became too ill to decide the cases, and he retired as an active judge. Petitioners then consented to having the special trial judge prepare findings and a proposed opinion to enable another regular judge of the Tax Court to decide their cases. J.A. 8-9, 13-14. The special trial judge's report proposed findings that the tax shelter in which petitioners participated was a sham and that petitioners entered into the shelter primarily to avoid payment of income taxes. Pet. App. A47. The chief judge of the Tax Court adopted the special trial judge's report and entered decisions in favor of the Commissioner. *Id.* at A14. The court of appeals affirmed. *Id.* at A1-A13.

1. Each of the petitioners invested in a commodity tax straddle program operated by First Western Government Securities (First Western). Stated simply, petitioners informed First Western how much tax loss they wished to secure and First Western charged petitioners fees of 7 to 8% of the desired losses. The fees supposedly were

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[1] The Tax Court is comprised of 19 judges who are nominated by the President and confirmed by the Senate. 26 U.S.C. 7443.

[2] A special trial judge is appointed by the chief judge of the Tax Court. 26 U.S.C. 7443A(a). The Tax Court currently employs 14 special trial judges. Special trial judges receive 90% of the salary of regular Tax Court judges and do not serve fixed terms. 26 U.S.C. 7443A(d).

paid for contracts to take or deliver Government mortgage-backed securities approximately 14 to 22 months in the future. In fact, no market in those securities existed so far in the future and no securities were ever delivered. Instead, First Western created investment portfolios on a computer in which petitioners would simultaneously contract to buy securities at some future date (the "long" leg of the straddle) and sell similar securities at another future date (the "short" leg of the straddle). If permitted by the Internal Revenue Code, the straddle scheme would have allowed petitioners to "cancel" the loss leg and deduct the loss against that year's ordinary income, while at the same time holding open the gain leg until it could be closed out in a later year, as an offsetting transaction involving a "sale or exchange," 26 U.S.C. 1221, thereby deferring recognition of income and reporting that income as capital gain. Pet. App. A3-A5, A8-A9, A14-A15, A19 n.6, A26.

2. The Commissioner disallowed the "loss" deductions claimed by petitioners with respect to their "investments" in First Western, and they, along with some 3,000 other participants in that scheme, petitioned the United States Tax Court for a redetermination of the resulting deficiencies. Petitioners' cases, together with six others, were chosen as test cases and consolidated for trial. Pet. App. A5-A6.

Trial commenced in December of 1984 before the Honorable Richard C. Wilbur, a regular judge of the Tax Court. Judge Wilbur became ill shortly after the trial began. Chief Judge Samuel B. Sterrett thereupon assigned the cases to Special Trial Judge Carleton D. Powell to conduct the remainder of the evidentiary proceedings. Those proceedings were videotaped so that Judge Wilbur could view the testimony, prepare a report, and render the decisions when he recovered his health. None of the petitioners objected to this assignment. Pet. App. A5-A6.

After all the evidence was taken, Judge Wilbur learned that his medical condition would not allow him to prepare the report in petitioners' cases.[3] By order dated July 23, 1986, Chief Judge Sterrett notified the parties that—unless they objected—he would assign Special Trial Judge Powell to prepare the report in their cases in accordance with 26 U.S.C. 7443A(b)(4), and that action on the report would be taken "by Judge Wilbur, or if not by this Division of the Court."[4] J.A. 9. One taxpayer (Wilhide, Inc.) objected to the assignment, J.A. 4, and its case was severed, Pet. App. A27 n.16; J.A. 6. The remaining test case taxpayers, including petitioners, agreed to the assignment on the understanding that Judge Wilbur or Chief Judge Sterrett would review Special Trial Judge Powell's report and make the decision of the Tax Court. J.A. 10-11; see 26 U.S.C. 7443A(c).

The special trial judge's report recommended that petitioners' deductions not be allowed. He proposed findings that "[t]he transactions between First Western and its customers were illusory and fictitious" and were "entered into primarily, if not solely, for tax-avoidance purposes." Pet. App. A47. His report described a tax shelter scheme in which First Western's ability to "control[] losses" through its computer system was so "fine[ly]-tune[d]" that it could "reach any result" its clients desired. *Id.* at A50. The computer-created "market" in which petitioners "invested" was so artificial that it "could not have existed if there had been any real economic substance to its program." *Id.* at A54. In reality, "First Western's world consisted of a computer spitting out paper showing huge transactions that had no economic significance except in petitioners' attempts to raid Federal and State fiscs." *Ibid.* The report also concluded that petitioners could be sanctioned under 26 U.S.C. 6673 because their litigating position was "frivolous"; rather than recommending the imposition of such sanctions, however, the report proposed only to warn other participants in the First Western scheme that petitioners' cases would be "the last free bites of that apple." Pet. App. A64.

[3] Judge Wilbur's disability ultimately compelled him to retire from active service on the Tax Court and he assumed senior status on April 1, 1986. J.A. 8.

[4] Pursuant to 26 U.S.C. 7444(c), the chief judge has designated each judge sitting alone as a "division" of the Tax Court.

The special trial judge's report was reviewed by Chief Judge Sterrett, who, on October 21, 1987, entered an order adopting the special trial judge's proposed findings and opinion and holding that petitioners' straddle transactions with First Western were shams and, in the alternative, that petitioners were not entitled to loss deductions because they had not entered into the transactions primarily for profit. Decisions were subsequently entered in favor of the Commissioner in accordance with that opinion by Judge Sterrett's successor as chief judge of the Tax Court, the Honorable Arthur L. Nims, III. Pet. App. A6, A14, A47-A65.

3. Petitioners appealed on the grounds that the Tax Court erred in finding that the transactions they entered into with First Western were shams, and that they had not intended to make a profit.[5] For the first time, petitioners also argued that the assignment of their cases to the special trial judge was unlawful. They contended that 26 U.S.C. 7443A(b)(4) allows special trial judges to hear and file reports only in minor tax cases. In addition, they contended that appointment of special trial judges by the chief judge of the Tax Court, as authorized by 26 U.S.C. 7443A(a), violates the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Pet. App. A7-A9 & n.9, A11 n.11.

The court of appeals affirmed the Tax Court's decisions in all respects. It held that 26 U.S.C. 7443A(b)(4) authorized assignment of petitioners' cases to a special

[5] Appeals from the decisions entered in three of the other test cases were taken to the United States Courts of Appeals for the Fourth and Sixth Circuits. Those cases, however, were later settled.

trial judge for hearing and report, noting that the statute and the Tax Court's procedures require a regular judge of the Tax Court to "control[] the outcome of the case." Pet. App. A7 n.8. The court further held that by consenting to the assignment, petitioners waived any objection they might have raised under the Appointments Clause. *Id.* at A8 n.9. Given this conclusion, the court found it unnecessary to rule on the merits of petitioners' Appointments Clause challenge.

On the deductibility of petitioners' claimed tax shelter "losses," the court of appeals held that the Tax Court "could not help but" conclude that the First Western transaction were shams, Pet. App. A8, and that it was "ludicrous to suggest that these petitioners had anything but a most fleeting interest in a potential economic gain" with respect to those transactions, *id.* at A11 n.11. Accordingly, the court affirmed the disallowance of petitioners' deductions.

SUMMARY OF ARGUMENT

1. Assignment of petitioners' cases to a special trial judge is authorized by the unambiguous language of 26 U.S.C. 7443A. That Section authorizes the chief judge of the Tax Court to assign a special trial judge to hear *and* decide three categories of cases (declaratory judgment proceedings, small cases under 26 U.S.C. 7463, and other small cases), and to hear, but *not* decide, "any other proceeding" in the Tax Court. The legislative history confirms that Congress intended the statutory phrase "any other proceeding" in 26 U.S.C. 7443A(b)(4) to mean that "*any* other proceeding" may be assigned to a special trial judge for hearing and preparation of proposed findings and opinion. See 1 H.R. Rep. No. 432, 98th Cong., 1st Sess. 266 (1983).

This authority is not new, and it is not limited to cases that are "minor" or lack "wide-ranging effect." Pet. Br. 18, 23. Statutory authority to assign a special trial judge (or "commissioner" as they formerly were called)

to hear (but not decide) any case within the jurisdiction of the Tax Court has existed since 1943. The chief judge frequently assigned large and complex cases to special trial judges on that authority before 1984. Consequently, when Congress adopted the "any other proceeding" provision in 1984, it codified special trial judges' authority to hear and report on any case within the Tax Court's jurisdiction.

2. Petitioners waived their right to challenge the special trial judge's appointment by giving their express consent to the chief judge's assignment of a special trial judge to hear and report on their cases. Application of the waiver rule in this case serves both to promote judicial economy and to prevent a party from waiting to raise objections that do not go to the merits until after he has lost his case on the merits.

Petitioners seek to avoid this basic rule by claiming that separation of powers challenges cannot be waived, and that this Court must therefore entertain their Appointments Clause claim despite their express consent below. This Court's prior decisions, however, have declined to enforce waivers only when the structural interests of the Article III Judiciary have been at stake. See *CFTC* v. *Schor*, 478 U.S. 833, 850-851 (1986); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-537 (1962); *Lamar* v. *United States*, 241 U.S. 103, 117-118 (1916). That is because litigants cannot be assumed to protect the institutional interests of the Judiciary. *Schor*, 478 U.S. at 850-851. That rationale is clearly inapplicable to petitioners' particular Appointments Clause challenge, which is based on a constitutional provision safeguarding the prerogatives of the Executive that the Executive can be expected to invoke and will be in a position to invoke in every tax case.

3. A. The duties performed by special trial judges assigned cases under 26 U.S.C. 7443A(b)(4) need not be performed by Officers of the United States. Like a special master assigned by an Article III court, a special

trial judge assigned under Section 7443A(b)(4) acts only as an aide to a judge of the Tax Court, who retains ultimate responsibility for making findings and entering the opinion and decision for the court. Unlike assignments under Section 7443A(b)(1)-(3)—where the special trial judge may be authorized to make the decision for the Tax Court—special trial judges in cases assigned under Section 7443A(b)(4) may only hear evidence and prepare proposed findings and opinions. Thus, the special trial judges in cases like these merely assist the judges of the Tax Court in discharging *their* ultimate responsibility to decide the cases. As assistants to Tax Court judges, special trial judges do not themselves exercise significant governmental authority and therefore are not "Officers of the United States" subject to the Appointments Clause.

B. If the duties performed by special trial judges in cases under 26 U.S.C. 7443A(b)(4) must be performed by Officers of the United States, their appointment by the chief judge satisfies the Appointments Clause. Special trial judges are at most "inferior" Officers of the United States, and, accordingly, Congress may vest power to appoint them "in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, Cl. 2. The answer to the question whether the Tax Court is included within the phrase "the Courts of Law" or the term "Departments," as those words are used in the Appointments Clause, turns on the status of the Tax Court within our tripartite system of separated powers. The Tax Court cannot exist in some headless fourth branch of government; it must be in the Legislative, Judicial, or Executive Branches established by the Constitution. Given its functions and the manner in which it discharges them, the Tax Court plainly cannot be in the Legislative Branch. See *INS* v. *Chadha*, 462 U.S. 919, 951 (1983). Given the Tax Court judges' lack of lifetime tenure and salary protection, the Tax Court plainly cannot be in the Judicial Branch. See U.S. Const.

Art. III, § 1; *Glidden*, 370 U.S. at 552 (plurality opinion). It therefore resides in the Executive Branch.

For the 45 years prior to 1969, the Tax Court was expressly designated by Congress as an agency within the Executive Branch. Although Congress established the Tax Court as a "court of record" under "article I of the Constitution" in 1969, its function, and the manner in which it performs that function, did not change. Nothing in the terms of the 1969 legislation purported to remove the Tax Court from the Executive Branch or to incorporate it into either the Legislative or Judicial Branches. It therefore remains an Executive Branch agency. The chief judge, as the "Head[]" of the "Department[]" called the Tax Court, may constitutionally be vested with authority to appoint "inferior Officers" of the United States.

This conclusion is faithful to the important constitutional purpose served by the Appointments Clause. That Clause—together with the Incompatibility Clause, Art. I, § 6, Cl. 2—embodies the basic departure of the Framers from the British Parliamentary system. The Appointments Clause ensures that the Legislative Branch will not intrude on executive or judicial functions by affecting the appointments process, beyond the constitutional role of advice and consent. Under the Clause, appointment authority can be vested by Congress only in the other two Branches, each of which possesses constitutional powers and prerogatives sufficient to withstand congressional efforts to affect particular appointments. Thus, "the Courts of Law" are limited to the Article III Judiciary (and do not include the Tax Court), because the Article III Judiciary can rely on life tenure and salary protection to resist legislative encroachment. And "Departments" is limited to Executive Branch Departments, protected from such encroachment by the various constitutional powers of the Chief Executive. Were the Tax Court not in the Executive Branch and therefore outside the scope of those protections, it would

be subject to precisely the sort of congressional interference in the appointments process that the Appointments Clause was designed to forestall. Because it is an Executive Branch Department, however, its "Head[]" may be vested with appointment authority under the terms of that Clause.

ARGUMENT

I. 26 U.S.C. 7443A(b)(4) AUTHORIZED THE CHIEF JUDGE OF THE TAX COURT TO ASSIGN PETITIONERS' CASES TO A SPECIAL TRIAL JUDGE

A. Section 7443A(b) of the Internal Revenue Code (26 U.S.C.) authorizes the chief judge of the Tax Court to assign four categories of cases to special trial judges: (1) "any declaratory judgment proceeding," 26 U.S.C. 7443A(b)(1); (2) "any proceeding" under 26 U.S.C. 7463 (whose informal procedures are available at the taxpayer's election in cases involving less than $10,000), 26 U.S.C. 7443A(b)(2); (3) "any proceeding" in which the deficiency or claimed overpayment does not exceed $10,000, 26 U.S.C. 7443A(b)(3); and (4) "any other proceeding which the chief judge may designate," 26 U.S.C. 7443A(b)(4). In the first three categories, the chief judge may assign the special trial judge not only to hear and report on a case but also to decide it. 26 U.S.C. 7443A(c). In the fourth category, the chief judge may only authorize the special trial judge to hear the case and prepare a report. The case must be decided by a regular judge of the Tax Court. 26 U.S.C. 7443A(c).

The chief judge's assignment of petitioners' cases to a special trial judge is authorized by the plain language of 26 U.S.C. 7443A(b)(4). Petitioners acknowledge as much; their objection is that "[t]he court of appeals read this language literally." Pet. Br. 12. Subsection (b)(4) permits the chief judge to assign "any other proceeding" (than the ones listed in subsections (1) through (3)) "to be heard by the special trial judges

of the court." Subsection (b)(4) is unambiguous. Its text contains no limiting term of the sort petitioners would imply that restricts its reach to cases that are "minor" or lack "wide-ranging effect." Pet. Br. 18, 23. See *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 928 (1991) ("[O]ur inquiry is complete if we find the text * * * to be clear and unambiguous."); *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 110 S. Ct. 456, 460 (1989) ("Our task is to apply the text, not to improve it."); *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 309 (1989) (Courts "are not at liberty to create an exception where Congress has declined to do so.").

The legislative history confirms that the statutory text means what it says, and that the chief judge may assign "*any* other proceeding" within the Tax Court's jurisdiction to special trial judges. In proposing to amend former 26 U.S.C. 7456(d) (now Section 7443A) to provide expressly for this category of assignments, the House Report stated that its purpose was "to clarify" that any other proceeding could be assigned to special trial judges "so long as a Tax Court judge must enter the decision." 1 H.R. Rep. No. 432, 98th Cong., 1st Sess. 266 (1983). The House Report explains:

> A technical change is made to allow the Chief Judge of the Tax Court to assign *any* proceeding to a special trial judge *for hearing and to write proposed opinions*, subject to review and final decision by a Tax Court judge, *regardless of the amount in issue.* However, special trial judges will not be authorized to enter decisions in this latter category of cases.

Ibid. (emphasis added). The Conference Report "follows the House bill." H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1127 (1984).

B. The 1984 amendment was regarded as "technical" in light of the historical development of the special trial judges' role. As we describe in detail below, that history demonstrates that Congress has *never* restricted the chief

judge's authority to assign special trial judges to hear (but not decide) cases to any particular subset of the Tax Court's jurisdiction. To the contrary, special trial judges and their predecessors—known as commissioners—have been authorized for almost half a century to hear *any* cases before the Tax Court in the discretion of its chief judge. In practice, special trial judges frequently heard and reported on large and complex cases before 1984. Accordingly, when Congress adopted subsection (b)(4) in 1984, it codified the chief judge's discretion to assign cases just like petitioners' to a special trial judge for hearing and preparation of a report. See, *e.g.*, *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) ("[T]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

In contrast, Congress has limited the authority of special trial judges to enter decisions to narrow categories of cases from the origin of that power in 1974. Congress's expansion of special trial judge's authority to hear *and decide* cases may well have been "measured [and] incremental." Pet. Br. 19-20. The accuracy of that observation, however, has no bearing on the scope of cases that special trial judges can hear but *not decide*. The authority in that category of cases has not changed since 1943.

Congress first conferred authority to employ what we now call special trial judges when it authorized the chief judge of the Tax Court "from time to time by written order [to] designate an attorney from the legal staff of the court to act as a commissioner in a particular case * * * [to] proceed under such rules and regulations as may be promulgated by the Tax Court." Section 1114 of the Internal Revenue Code of 1939, as amended by Section 503 of the Revenue Act of 1943, ch. 63, 58 Stat. 72; see H.R. Rep. No. 871, 78th Cong., 1st Sess. 71-72 (1943). The statute did not restrict the types of proceedings in which commissioners could be used.[6] That authority was continued, without substantial change, in Section 7456(c) of the 1954 Code, as originally enacted. In 1969, Congress amended that provision to provide for appointment of full-time commissioners, serving for indefinite terms, who were to "proceed under such rules and regulations as may be promulgated by the court." Section 7456(c), amended by Tax Reform Act of 1969, Pub. L. No. 91-172, § 958, 83 Stat. 734. Section 502(a)(2)(A) of the 1969 Act (83 Stat. 630) also created an elective, streamlined procedure for small tax cases,[7] but it did not restrict the use of commissioners to such cases.

More than 30 years after commissioners were authorized to hear and report on cases pending before the Tax Court, Congress for the first time authorized the Tax Court to permit commissioners to decide a case. In 1974, Congress enacted provisions permitting the maintenance of declaratory judgment actions in cases relating to the qualification of certain retirement plans, and authorized the chief judge of the Tax Court, in his discretion, to permit commissioners to hear and make the decisions of the court in such cases. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 1041(a), 88

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[6] Commissioners were apparently "used sparingly" at first. H. Dubroff, *The United States Tax Court: An Historical Analysis* 346 (1979). The first reported designation of a "commissioner" occurred in 1948. The commissioner was assigned to hear the evidence and make recommended findings of fact, but not to propose conclusions of law. *Bib Mfg. Co.* v. *Secretary of War*, 12 T.C. 665, 672 (1949).

[7] The elective small case procedure originally applied only to cases involving disputed issues of no more than $1,000, an amount increased to $1,500 in 1972, Act of Oct. 20, 1972, Pub. L. No. 92-512, § 203(b)(2), 86 Stat. 945, to $5,000 in 1978, Revenue Act of 1978, Pub. L. No. 95-600, § 502(a)(1), 92 Stat. 2879 and to $10,000 in 1984, Tax Reform Act of 1984, Pub. L. No. 98-369, § 461, 98 Stat. 823. Proceedings in such cases may be conducted informally, and the decisions entered in them are not appealable by either party. 26 U.S.C. 7463.

Stat. 949 (codified at 26 U.S.C. 7456(c)). In 1978, Congress amended 26 U.S.C. 7456(c) to expand the Tax Court's authority to allow commissioners to make decisions in declaratory judgment proceedings, and added 26 U.S.C. 7463(g), providing the same authority in the case of small tax proceedings under that Section. Revenue Act of 1978, Pub. L. No. 95-600, §§ 336(b)(1), 502(b), 92 Stat. 2841-2842, 2879. After further expansion, the provisions allowing entry of decision by commissioners were redesignated in 1982 as 26 U.S.C. 7456(d), and encompassed all three categories now set forth in 26 U.S.C. 7443A(b)(1)-(3). Miscellaneous Revenue Act of 1982, Pub. L. No. 97-362, § 106(c)(1), 96 Stat. 1730.

While Congress was expanding the authority of commissioners to hear and decide cases, their employment in the traditional task of hearing cases had expanded dramatically. Chief judges assigned commissioners to hear the full spectrum of Tax Court cases, including complex cases and cases involving lengthy trials.[8] The provisions governing the assignment of special trial judges took essentially their present form in 1984, when Congress changed the term "commissioner" to "special trial judge" and added to 26 U.S.C. 7456(d) the provision corresponding to present 26 U.S.C. 7443A(b)(4). Tax Reform Act of 1984, Pub. L. No. 98-369, § 463(a), 98 Stat. 824. In 1986, the provisions of former Section 7456(c) and (d) were moved, without substantial change, to new Section 7443A. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1556(a), 100 Stat. 2754. By providing that

[8] See, *e.g.*, *Perrett* v. *Commissioner*, 74 T.C. 111 (1980); *Karme* v. *Commissioner*, 73 T.C. 1163 (1980), aff'd, 673 F.2d 1062 (9th Cir. 1982); *Jacqueline, Inc.* v. *Commissioner*, 36 T.C.M. (CCH) 1363 (1977); *Estate of Wheeler* v. *Commissioner*, 37 T.C.M. (CCH) 51 (1978); *Estate of Thurner* v. *Commissioner*, 37 T.C.M. (CCH) 981 (1978); *McKinley* v. *Commissioner*, 37 T.C.M. (CCH) 1769 (1978); *Freidus* v. *Commissioner*, 39 T.C.M. (CCH) 740 (1979). See generally 2A L. Casey, *Federal Tax Practice* § 8.34, at 275 (1981) (the assignments of special trial judges, *i.e.*, commissioners, covered a "broad range," including "the trial of lengthy cases").

special trial judges could hear and decide three different categories of cases, and could hear (but not decide) "any other proceeding," Congress codified the chief judge's longstanding authority to assign any case within the Tax Court's jurisdiction to a special trial judge for hearing and report.

C. Petitioners contend that "the 'any other proceeding' language of 26 U.S.C. 7443A(b)(4) must be read in light of the narrow grants of jurisdiction in §§ (b)(1)-(3)." Pet. Br. 17. They suggest that subsection (b)(4) is a "catch-all" provision, Pet. Br. 17, 22, embracing the same type of cases as the declaratory judgment proceedings and small tax cases described in the first three subsections; on that view, subsection (b)(4) does not authorize assignment to a special trial judge of large or complex cases like theirs. Pet. Br. 17-20.

Subsection (b)(4), however, is clearly not a "catch-all" designed to plug unintended gaps left by subsections (b)(1) through (b)(3). As the very next subsection makes clear, special trial judges can hear *and decide* declaratory judgment proceedings and small tax cases under subsections (b)(1) through (b)(3); they can hear but may *not decide* proceedings under subsection (b)(4). 26 U.S.C. 7443A(c). The lesser authority special trial judges exercise in proceedings under subsection (b)(4) prevents that provision from serving as a "catch-all" for subsections (b)(1) through (b)(3). It also furnishes additional evidence that the scope of subsection (b)(4) must be greater than that of subsections (b)(1) through (b)(3): for if the cases special trial judges can hear (but *not* decide) under subsection (b)(4) are limited to declaratory judgment actions and small cases of the sort they could hear *and* decide under subsections (b)(1) through (b)(3), subsection (b)(4) would be superfluous. See, *e.g.*, *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 110 S. Ct. 2126, 2133 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to

render superfluous other provisions in the same enactment.").

Petitioners' misunderstanding of the function of subsection (b)(4) renders inapposite their analogy to *Gomez* v. *United States*, 490 U.S. 858 (1989). Pet. Br. 17-22. *Gomez* involved the question whether Section 636(b) of the Federal Magistrates Act (28 U.S.C. 636(b)) authorized a district court to assign a magistrate to preside over jury selection in a criminal felony trial without the defendant's consent. Although the statutory language allowing assignment to a magistrate of "such additional duties as are not inconsistent with the Constitution and laws of the United States" is broad, this Court reasoned that presiding over jury selection was unrelated to the carefully defined grant of authority to conduct trials of civil matters and minor criminal cases and was at odds with the "repeated statements" in the legislative history that magistrates should only "handle subsidiary matters to enable district judges to concentrate on trying cases." 490 U.S. at 872. Moreover, the Court remarked, there could be no meaningful review and correction of jury selection by the district court. Consequently, the Court concluded that Congress could not have intended for the "additional duties" clause to include presiding over jury selection in felony trials. *Id.* at 874-876.

Unlike the "catch-all" provision at issue in *Gomez*, subsection (b)(4) does not extend special trial judges' authority to hear *and decide* cases under subsections (b)(1) through (b)(3) to any case within the Tax Court's jurisdiction. A special trial judge assigned pursuant to subsection (b)(4) may only hear a case and prepare proposed factual findings and legal conclusions; a regular Tax Court judge remains responsible for deciding the case. 26 U.S.C. 7443A(c). Precisely because the special trial judge's authority under subsection (b)(4) is less than that under subsections (b)(1) through (b)(3), it extends to "any other proceeding" before the

Tax Court, regardless of the amount involved or the nature of the controversy.

D. Petitioners contend that "[e]ven if a special trial judge may hear a complex tax case, he may not effectively resolve it subject only to deferential Tax Court review." Pet. Br. 20. The relevance of this point to the question on which this Court granted certiorari—whether the assignment of petitioners' cases to a special trial judge is authorized by 26 U.S.C. 7443A(b)(4), see Pet. Br. i—is not immediately apparent. The question whether the assignment is permitted is different from the question of the appropriate standard of review once the assignment is made. The court of appeals properly rejected petitioners' assertion that Chief Judge Sterrett "rubber-stamp[ed]" the special trial judge's report, Pet. Br. 24, and petitioners did not seek review of that claim, see Br. in Opp. 7 n.6.

In any event, petitioners are quite correct that special trial judges may not decide cases assigned to them under 26 U.S.C. 7443A(b)(4), and are quite wrong in suggesting that a deferential standard of review allows them in effect to do so. Pet. Br. 6-7, 13, 21-23. By statute, a special trial judge has no authority to decide a case assigned under that provision; that remains the responsibility of a regular Tax Court judge. 26 U.S.C. 7443A(c); see Pet. App. A7 ("The chief judge had both the obligation and power to maintain full responsibility for the decision in this case."). As petitioners (correctly) stated in the court of appeals, they "are entitled to a careful *de novo* review of the findings of a special trial judge by a tax court judge because the special trial judge cannot make the decision in a case assigned to him under § 7443A(b)(4)." Pet. C.A. Reply Br. 3 (footnote omitted); *id.* at 3 n.5 ("The responsibility for evaluating the evidence is placed upon the tax court judge who reviews the proposed report of the special trial judge."); accord Pet Br. 43 n.42 (petitioners anticipated "*de novo* review

* * * when they accepted the mid-trial reassignment to Judge Powell").[9]

Reversing field in this Court, petitioners now insist that *de novo* review is forbidden by Tax Ct. R. 183. Pet. Br. 6-7, 21. Contrary to petitioners' contention, Rule 183

[9] The record in no way supports the contention that the special trial judge in effect decided petitioners' cases. As the court of appeals explained in rejecting this assertion, "the opinion in this case was issued by the Tax Court in the name of the chief judge," who "had both the obligation and power" to decide the case. The court of appeals found the "record * * * devoid of any evidence that even remotely suggest[ed]" that the chief judge failed to discharge his obligation "in good faith," other than what it surmised was a short time span between the filing of the special trial judge's report and issuance of the opinion by the chief judge. Pet. App. A7-A8.

On the last point, the court of appeals apparently credited petitioners' claim that the special trial judge filed his report on the same day Chief Judge Sterrett issued his opinion. Pet. App. A8. Nothing in the record supports that assertion. The Tax Court's docket entries and order on which petitioners rely, Pet. Br. 8, indicate that the case was formally reassigned to Chief Judge Sterrett "for disposition" on October 21, 1987, prior to his entry of decision on that day. J.A. 6, 15. They do *not* reflect the date on which the special trial judge's report was submitted to Chief Judge Sterrett. *Ibid.* Indeed, the Tax Court's practice is formally to reassign cases heard by special trial judges to regular Tax Court judges only when the latter are ready to enter decisions in the cases. See, *e.g.*, *Abeson* v. *Commissioner*, 59 T.C.M. (CCH) 391 (1990) (Docket Nos. 82 & 83), appeal pending on other grounds, No. 91-70086 (9th Cir.); *Corra Resources, Ltd.* v. *Commissioner*, 59 T.C.M. (CCH) 102 (1990) (Docket Nos. 28 & 29), appeal pending on other grounds, No. 90-3365 (7th Cir.); *Hildebrand* v. *Commissioner*, 58 T.C.M. (CCH) 1470 (1990) (Docket Nos. 20 & 21), appeal pending on other grounds, No. 91-70030 (9th Cir.). For that reason, the date on which the chief judge reassigned petitioners' cases to himself "for disposition" tells nothing about how long the chief judge had the report or worked on the cases prior to deciding them. Yet the docket entries and order are all that petitioners point to in support of their charge that the chief judge acted—contrary to 26 U.S.C. 7443A(c)—as a "rubber stamp." Pet. Br. 24. See *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965) (administrative agencies are entitled to presumption "that they will act properly and according to law").

does not limit Tax Court judges to "clear error" review of special trial judges' reports. Rule 183 provides that the Tax Court judge responsible for deciding a case may adopt, modify, or reject the special trial judge's report in whole or in part, may request additional briefing, and "may receive further evidence"—an authority that is flatly inconsistent with "clear error" review, under which an appellate tribunal reviews the adequacy of findings on the basis of the record before the fact-finder. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-574 (1985). Petitioners rely entirely on the last sentence in the Rule, which states that "[d]ue regard" shall be given to special trial judges' credibility determinations and that "findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Pet. Br. 6-7, 13, 21-23. Although the phrasing of this sentence is not ideal, it does not limit the regular Tax Court judge deciding the case to "clear error" review, and has not been so understood by the Tax Court. Instead, the Rule requires the regular judge to start with the facts found by the special trial judge before considering the parties' proposed findings of "essential fact" under Tax Ct. R. 151(e)(3). As the court of appeals correctly concluded, the Tax Court judge to whom the case is assigned "controls the outcome of the case," notwithstanding the presumption of correctness. Pet. App. A7 n.8.[10]

[10] The court of appeals also rejected petitioners' argument that *Stone* v. *Commissioner*, 865 F.2d 342, 344-347 (D.C. Cir. 1989), reversing *Rosenbaum* v. *Commissioner*, 45 T.C.M. (CCH) 825 (1983), limits Tax Court judges to "clear error" review of special trial judges' proposed factual findings. Pet. App. A8 n.8. Although *Stone* so held, see 865 F.2d at 345, the Tax Court has never retreated from the position it took in *Rosenbaum* that "the presumptive correctness of the Special Trial Judge's report does not impair nor dilute our duty of bearing the ultimate responsibility for determining matters before us." *Rosenbaum*, 45 T.C.M. (CCH) at 827. In accordance with that position, the Tax Court no longer furnishes litigants a copy of the special trial judge's report, nor does it invite the parties to file exceptions to the report. *Ibid.*;

Petitioners invoke the canon of statutory construction that presumes Congress intended to enact a constitutional statute in their effort to limit the "any other proceeding" language of 26 U.S.C. 7443A(b)(4) to small cases. Pet. Br. 14-17. A preference for giving statutes a constitutional meaning, however, is a finger on otherwise balanced scales at the end of the process of interpretation, not at the beginning. It is emphatically "not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Monsanto*, 109 S. Ct. 2657, 2664 (1989) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)). Petitioners' interpretation of subsection (b)(4) to mean "any other [small] proceeding" would require this Court to override the plain language of the statute, its structure, and the pre-codification history of special trial judges hearing cases selected from the full cross-section of the Tax Court's jurisdiction. Canons of construction like the one petitioners invoke are useful only when language is ambiguous and "a construction of the statute is *fairly possible* by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932) (emphasis added). It is not authority to hold that a statute means what it plainly does not say. *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964).

Pet. App. A8 n.8. As the court of appeals concluded, "this change in rules, in our view, confirms that the Tax Court's relationship with its special trial judges cannot be analogized to typical appellate review." *Ibid.* No court has held to the contrary since the change in the Tax Court's practice.

Petitioners (Pet. Br. 23) quote the court of appeals' statement that whether a particular transaction is a sham "is a question of fact reviewed under the clearly erroneous standard," Pet. App. A8, but the court of appeals was referring to *its* review of the *Tax Court's* determination, not the regular Tax Court judge's review of the special trial judge's report.

II. PETITIONERS WAIVED ANY RIGHT TO CHALLENGE THE APPOINTMENT OF THE SPECIAL TRIAL JUDGE IN THEIR CASE BY CONSENTING TO HAVE THEIR CASES HEARD BY THE SPECIAL TRIAL JUDGE

Petitioners not only failed to raise a timely objection to assignment of their cases to a special trial judge, they expressly consented to the assignment. As the court of appeals correctly held, "[b]y consenting to the assignment * * * [petitioners] waived" any right to challenge the special trial judge's appointment under the Appointments Clause, Art. II, § 2, Cl. 2. Pet. App. A8 n.9.[11]

A. This Court has emphasized that "[n]o procedural principle is more familiar to [the] Court than that a * * * right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); accord *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940); *Blair* v. *Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927) ("There are specially cogent reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government."). Requiring timely assertion of an objection serves two important purposes: it promotes judicial economy by alerting the lower court to a problem at a time

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[11] Petitioners' express consent distinguishes this case from *Gomez*, in which the defendant objected to permitting a magistrate to conduct jury selection, and from *United States* v. *France*, 886 F.2d 223 (9th Cir. 1989), aff'd without opinion by equally divided court, 111 S. Ct. 805 (1991), in which the court of appeals entertained the challenged of a litigant who failed to object to the same action.

On the same day the Court granted certiorari in this case, the Court also granted certiorari in *Peretz* v. *United States*, No. 90-615 (Jan. 22, 1991). *Peretz* presents the question whether express consent to assignment of a magistrate for jury selection waives any right to challenge the assignment on the authority of this Court's subsequent decision in *Gomez*.

when the court may be able to resolve the matter to the party's satisfaction, see *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977); and it prevents a party from pursuing a certain course at trial for tactical reasons and later—if the outcome is unfavorable—claiming that the course followed constituted reversible error, see *id.* at 89.

Petitioners' conduct in this case falls squarely within the letter and spirit of this Court's settled practice of requiring contemporaneous objections. But petitioners did not just commit a procedural default in the Tax Court; they expressly consented to the assignment of a special trial judge to hear and report on their cases with full knowledge of the consequences of their decision.[12] Petitioners' consent led the Tax Court to assign special trial judge Powell to hear and report on their cases, rather than another judge, as was ordered in the case of the one litigant who *did* object to the assignment. J.A. 4-6. If petitioners are permitted to withdraw their consent now, many months of trial time will have been wasted. What is worse, petitioners will have been permitted to withdraw their consent and assert reversible error not just after the trial, but after they learned that the supposed error did not work to their benefit.

This Court should not be moved by petitioners' crocodile tears that their consent was involuntary. Pet. Br. 49-50. Consent to the special trial judge's preparation of a report in petitioners' cases was not a "compelled alternative" to retrial before a regular Tax Court judge. *Pacemaker Diagnostic Clinic of America* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984); cf. *CFTC* v. *Schor*, 478 U.S. 833, 850 (1986) (offer of "quicker and less expensive" adjudication does not necessarily coerce consent). Semble *Arizona* v. *Fulminante*, No. 89-839 (Mar. 26, 1991), slip op. 4. Conclusive proof is that the relief petitioners seek in this Court—"a remand for trial before a regular tax court judge," Pet. Br. 37—is precisely the prospect that petitioners insist forced their consent in 1986. The options available to petitioners (consent to the special trial judge's preparation of the report or retrial before a regular Tax Court judge) have not changed since that time. What is new is that petitioners now know that they lose under the option they initially preferred. If an Appointments Clause challenge can ever be waived, petitioners should be held to have waived it here.

B. Petitioners contend that the court of appeals was required to entertain their belated Appointments Clause challenge because separation of powers claims may never be waived. Pet. Br. 43-46.[13] The cases on which petitioners rely for this sweeping proposition—*CFTC* v. *Schor*, 478 U.S. 833 (1986), *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), and *Lamar* v. *United States*, 241 U.S. 103 (1916), Pet. Br. 41-47—hold only that litigants may not waive the structural limitations *of Article III*, because that Article serves "institutional interests that the parties cannot be expected to protect," *Schor*, 478 U.S. at 850-851. The rationale of those cases has no necessary application to separation of powers claims not involving the Judiciary; it is clearly inapplicable to petitioners' par-

[12] The chief judge notified petitioners of his proposal to assign their cases to special trial judge Powell "for purposes of preparing the report," J.A. 8, and invited petitioners' objection (if any) to the assignment, J.A. 9. Petitioners—represented by counsel—discussed with the chief judge the options available to them and the terms on which they would consent to the assignment, J.A. 10-11, and ultimately entered a formal stipulation to the assignment, J.A. 13. Whether the Tax Court's procedures are sufficient to ensure knowing and voluntary consent in *other* cases, Pet. Br. 47-48, is irrelevant to petitioners' claim in this one: *their* consent was knowing and voluntary, and outside the First Amendment context parties may assert only their own rights, not those of others. *E.g.*, *Powers* v. *Ohio*, No. 89-5011 (Apr. 1, 1991), slip op. 10; *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976).

[13] Although challenges to an Article III court's subject matter jurisdiction are not waivable, the Tax Court is not an Article III court, and, in any event, petitioners "do not claim that Tax Court special trial judges lack subject matter jurisdiction." Reply to Br. in Opp. 3.

ticular challenge, which is based on a constitutional provision safeguarding the prerogatives of the Executive that the Executive can be expected to invoke and—in tax cases—will always be in a position to invoke. The Constitution separates the executive, legislative, and judicial powers precisely because the great departments can be trusted to protect their own institutional interests. See, *e.g.*, The Federalist No. 51, at 349 (J. Madison) (J. Cooke ed. 1961) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."). Exceptions to the general rule of waivability should be reserved for situations where litigants cannot be relied on to protect the institutional interests at stake, not where we know they can.

1. In *Schor*, this Court held that parties may waive their personal right to adjudication by an Article III court, 478 U.S. at 848-850, but "[t]o the extent that this structural principle [*i.e.*, of Article III] is implicated in a given case, * * * notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect," *id.* a 850-851.[14] *Schor* involved the assertion of jurisdiction by the Commodity Futures Trading Commission, a non-Article III forum, over a common law counterclaim —"a claim of the kind assumed to be at the 'core' of matters normally reserved to Article III courts." *Id.* at 853. Hence, the institutional interest at stake was the "institutional integrity of the Judicial Branch," *id.* at 851—an

[14] Petitioners' edited quotation of the holding in *Schor*, Pet. Br. 44, begins after the Court's reference to "*this* structural principle," which refers to Article III, 478 U.S. at 850 (emphasis added), and omits the first clause of the next sentence, which states that "[w]hen *these Article III limitations are at issue*, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect," *id.* at 851 (emphasis added).

interest that parties content to have their dispute resolved by the CFTC might (at least initially) have no interest in protecting.

Unlike the situation in *Schor*, the assignment of special trial judges in Tax Court cases does not raise the specter of "a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts," 478 U.S. at 855. Tax controversies are not matters of private right "normally reserved to Article III courts," *id.* at 853. As petitioners concede, Pet. Br. 20 n.21, 35, tax disputes are "matters, involving public rights, * * * which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper," *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). The need to enforce "Article III limitations" that prompted the Court to dishonor the express consent in *Schor* thus has no application to this case.[15]

Glidden and *Lamar*, on which petitioners also rely, Pet. Br. 41-43, likewise involved challenges premised on Article III. The validity of the judgments in those cases arguably turned on the authority of the judges who entered them (or participated in entering them). See *Glidden*, 370 U.S. at 535-537 (plurality opinion); *Lamar*, 241 U.S. at 117-118.[16] Justice Harlan's explanation why the plurality

[15] *Pacemaker Diagnostic Clinic of America* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984), is distinguishable for the same reason. At issue in that case was the consensual assignment of a case to a magistrate for adjudication. Thus, the case presented essentially the same question as in *Schor*—whether an official who did not enjoy the life tenure and salary protection guaranteed to the Article III Judiciary could properly adjudicate the claims in question.

[16] See also *Burnham* v. *Superior Court*, 110 S. Ct. 2105, 2109 (1990) (plurality opinion) ("The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, * * *. Traditionally that proposition was embodied in the phrase *coram non judice*, 'before a person not a judge'—meaning, in effect, that the proceeding in question was not a *judicial* proceed-

would ignore the waiver in those cases rests entirely on structural limitations imposed by Article III and the prerogatives of the Judicial Branch.[17]

2. *Schor*, *Glidden*, and *Lamar* all involved "institutional interests that the parties cannot be expected to protect." 478 U.S. at 851. The concern in those cases was that if Article III objections could be waived by the parties, the Judiciary might be incapable of protecting its constitutional prerogatives. The Judicial Branch exercises power only through the decision of "Cases [and] Controversies," U.S. Const. Art. III, § 2, and if enforcement of waiver rules precluded it from protecting its institutional interests in the context of deciding such cases, those interests would go unprotected. That rationale does not extend to every separation of powers challenge, and has no application to the Appointments Clause challenge raised by petitioners in this case.

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ing because lawful judicial authority was not present, and could therefore not yield a *judgment*.").

[17] Whatever may be the rule when *a judge's authority* is challenged at the earliest practicable moment * * *, in other circumstances involving *judicial authority* this Court has described it as well settled "that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public." The rule is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware. * * *

The rule does not obtain, of course, when the alleged defect of authority operates as a limitation on this Court's *appellate jurisdiction*. In other circumstances as well, when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of *judicial business*, this Court has treated the alleged defect as "*jurisdictional*" and agreed to consider it on direct review even though not raised at the earliest practicable opportunity.

370 U.S. at 535-536 (emphases added; citations omitted); see *id.* at 536 (discussing *Lamar*).

Together with the Incompatibility Clause, Art. I, § 6, Cl. 2,[18] the Appointments Clause reflects the Framers' rejection of the cardinal feature of parliamentary systems, in which members of the legislature serve as and appoint executive officers. The structural interests implicated in *this* case are thus those of the President and the Executive Branch itself, which can be expected vigorously to challenge legislative encroachments on presidential prerogatives under that Clause.[19] Unlike the Article III limitations at issue in *Schor*, *Glidden*, and *Lamar*, the Appointments Clause embodies an interest that at least one of the parties to every tax dispute (the Executive) can be expected to protect.[20] In Appointments Clause cases the institutional interests at stake are those of the Executive, and in tax cases the Executive will always be able to defend those interests. Accordingly, there is no reason, as there was in the Article III cases, for rescuing petitioners from the choice they made when they consented to allow the trial to proceed in accordance with statutory procedures.

Indeed, "[t]he Court [has] developed, for its own governance in the cases confessedly within its jurisdiction,

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[18] Art. I, § 6, Cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

[19] Contrary to petitioners' suggestion, this case does not implicate any prerogative of the Judiciary to appoint inferior Officers as a "Court[] of Law" under the Appointments Clause. Pet. Br. 46 n.46. There is no question that the Tax Court is not an Article III court. Even more clearly, the chief judge of that court, in whom 26 U.S.C. 7443A(a) vests the power of appointing special trial judges, is not an Article III court.

[20] In listing cases in which the Justice Department failed, in petitioners' view, to defend adequately the interests of the Executive Branch, Pet. Br. 46 n.47, petitioners fail to mention that the Solicitor General argued against the constitutionality of the legislation in *Morrison* v. *Olson*, 487 U.S. 654, 659 (1988), *Bowsher* v. *Synar*, 478 U.S. 714, 716 (1986), and *INS* v. *Chadha*, 462 U.S. 919, 922 (1983).

[the rule that] * * * [t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). That prudential rule applies with even greater force where, as here, the question is *not* properly presented.

III. THE TAX COURT CHIEF JUDGE'S APPOINTMENT OF THE SPECIAL TRIAL JUDGE WHO HEARD PETITIONERS' CASES DID NOT VIOLATE THE APPOINTMENTS CLAUSE

A. A Special Trial Judge Assigned Under 26 U.S.C. 7443A(b)(4) Performs Duties That May Be Performed By An Employee Not Subject To The Appointments Clause

Petitioners' contention that the special trial judge assigned to their cases performed duties that can only be performed by an Officer subject to the Appointments Clause must fail if special trial judges do not effectively decide cases under 26 U.S.C. 7443A(b)(4).[21] For it is well settled that persons who merely assist Officers in discharging their duties, and whose authority is not significant under the laws of the United States, are "lesser functionaries subordinate to officers of the United States." *Buckley* v. *Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam); *United States* v. *Smith*, 124 U.S. 525, 531-532 (1888).[22]

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[21] Petitioners seem to concede as much, when they argue that they had no occasion to raise their Appointments Clause challenge until the Tax Court—in their view—"denied the *de novo* review they anticipated when they accepted the mid-trial reassignment to Judge Powell." Pet. Br. 43 n.42.

[22] See *Steele* v. *United States No. 2*, 267 U.S. 505, 508 (1925) ("The deputy marshal is not in the constitutional sense an officer of the United States, and yet marshals and deputy marshals are the

A special trial judge assigned under 26 U.S.C. 7443A(b)(4) acts only as an aide to the Tax Court judge responsible for deciding the case. 26 U.S.C. 7443A(c). That judge may adopt, modify, or reject entirely the report of the special trial judge. Tax Ct. R. 183(c). Alternatively, he may request additional briefs, receive further evidence, direct further oral argument, or recommit the report to the special trial judge with instructions. *Ibid.* The special trial judge's role is only to assist the judge in taking the evidence and preparing proposed findings and an opinion. In other words, the special trial judge merely helps the Tax Court judges discharge the responsibilities of *their* offices.[23] Cf. *Morgan* v. *United States*, 298 U.S. 468, 481-482 (1936). The fact that staff attorneys acted as special trial judges from 1943 until 1969, see pp. 12-13, *supra*, is convincing evidence that special trial judges acting pursuant to 26 U.S.C. 7443A(b)(4) are employees rather than "Officers of the United States."[24]

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persons chiefly charged with the enforcement of the peace of the United States, as that is embraced in the enforcement of federal law"); *United States* v. *Germaine*, 99 U.S. 508, 511 (1878) ("inferior commissioners and bureau officers" are "mere aids and subordinates"); *United States* v. *Mitchell*, 89 F.2d 805, 808 (D.C. Cir. 1937) (attorneys employed by independent administrative agency are not "Officers" for purposes of Appointments Clause).

[23] Even the ability of special trial judges to regulate proceedings before them is made "[s]ubject to the specifications and limitations in the order designating" the special trial judge, Tax Ct. R. 181, so that regulation of every proceeding remains subject at all times to the complete control of the chief judge of the Tax Court.

[24] On signing the Omnibus Budget Reconciliation Act of 1989, the President addressed a provision authorizing appointment of special masters by the United States Claims Court, and noted that

> an "arbitrary and capricious" standard for review of special master decisions by Claims Court judges could raise constitutional questions by vesting significant authority pursuant to the laws of the United States in persons whose appointment and removal are inconsistent with the requirements of Article II of the Constitution, and by circumscribing the ability of Article

Petitioners' analogy of special trial judges to federal magistrates, Pet. Br. 28, ignores the special trial judges' lack of independent decision-making authority in cases to

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I and Article III judges to review the decisions of these persons. Accordingly, to place this issue beyond doubt, the Attorney General and the Secretary of HHS will work together to submit legislation that would ensure *de novo* review of decisions rendered by the special masters.

Statement of the President on Signing the Omnibus Budget Reconciliation Act of 1989, 25 Weekly Comp. Pres. Doc. 1970-1971 (Dec. 19, 1989). Unlike Claims Court special masters, the reports of special trial judges assigned under 26 U.S.C. 7443A(b)(4) are already reviewed *de novo* by the Tax Court judge responsible for deciding the case. See pp. 17-19 & nn.9-10, *supra*. Moreover, the constitutional status of the Tax Court and the Claims Court may not be the same, see, *e.g.*, 28 U.S.C. 176 (Claims Court judges removable by the United States Court of Appeals for the Federal Circuit), and accordingly they may differ in their capacity to appoint inferior Officers.

Although special trial judges may be assigned to render the decision of the court in declaratory judgment proceedings and small tax cases within 26 U.S.C. 7443A(b)(1)-(3), see 26 U.S.C. 7443A(c), petitioners have standing only to assert their own rights, not those of taxpayers whose cases are assigned to special judges under other provisions. See *Powers* v. *Ohio*, No. 89-5011 (Apr. 1, 1991), slip op. 10 ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief premised on the legal rights or interests of third parties."). If the special trial judge assigned to *their* cases performed duties that may performed by an employee, petitioners suffered no injury from any defect in appointment. See *Allen* v. *Wright*, 468 U.S. 737, 751 (1984) (Article III standing requires that "[t]he injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision."); see also *Buckley* v. *Valeo*, 424 U.S. at 137-139 (members of Federal Election Commission not appointed consistent with the Appointments Clause could continue to perform statutory duties not requiring an Officer). The Tax Court's conclusion in *First Western Government Securities, Inc.* v. *Commissioner*, 94 T.C. 549 (1990), appeal pending *sub nom. Samuels, Kramer & Co.* v. *Commissioner*, Nos. 90-4060 & 90-4064 (2d Cir.) (argued Oct. 24, 1990), that special trial judges are inferior Officers, rested on their ability to decide small cases under 26 U.S.C. 7443A(c)—an authority that the special trial judge assigned to petitioners' cases did not have.

which they are assigned pursuant to 26 U.S.C. 7443A(b)(4)—the only authority at issue in this case. Federal magistrates possess "all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts." 28 U.S.C. 636(a)(1).[25] United States commissioners, in turn, possessed extensive power, "including the power to arrest and imprison for trial * * * and to institute [certain] prosecutions." *Morrison* v. *Olson*, 487 U.S. 654, 673 (1988); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 353 n.2 (1931). A special trial judge assigned under 26 U.S.C. 7443A(b)(4), in contrast, exercises no such similar authority—indeed, no *independent* authority whatever. For that reason, this Court's cases holding that United States commissioners and federal magistrates are inferior Officers, *Go-Bart Importing Co.* v. *United States*, 282 U.S. at 352; *Rice* v. *Ames*, 180 U.S. 371, 378 (1901), do not establish that special trial judges assigned under 26 U.S.C. 7443A(b)(4) are also exercising powers that may be performed only by inferior Officers.

It is true that magistrates, like special trial judges, may be assigned to conduct hearings and to submit proposed findings of fact and recommendations for disposition. 28 U.S.C. 636(b)(1)(B). The findings and proposed opinion of the magistrate, however, are reviewed by the District Court only if the parties object. 28 U.S.C. 636(b)(1)(B); see *United States* v. *Raddatz*, 447 U.S. 667, 673 (1980). By comparison, the Tax Court judge must decide every case assigned to a special trial

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[25] With the consent of the parties, magistrates are also "authorized to preside at and enter final judgment in civil trials, including those tried before a jury * * * [and] to conduct jury as well as bench trials on any misdemeanor charge," 28 U.S.C. 636(a)(4) and (c)(1), as this Court pointed out in *Gomez*, 490 U.S. at 870. In such trials, appeal may then be taken directly to the court of appeals (unless the parties also consent to appeal to a judge of the District Court). 28 U.S.C. 636(c)(1) and (3).

judge under 26 U.S.C. 7443A(b)(4); no objection or exception to the special trial judge's report is necessary or even possible, because submission of the special trial judge's report is a matter internal to the Tax Court. See Pet. App. A8 n.8; pp. 19-20 n.10, *supra*.

Moreover, the conduct of evidentiary hearings is not confined to Officers of the United States. This Court has frequently gathered evidence through assistants who were not appointed in conformity with the Appointments Clause. As early as *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 50 U.S. (9 How.) 647, 657 (1850), the Court, on its own motion and without statutory authority, appointed a commissioner to take evidence and to provide a report to the Court. That practice continues to this day. See, *e.g.*, *United States* v. *Louisiana*, 394 U.S. 11, 78 (1969); *South Carolina* v. *Regan*, 465 U.S. 367, 382 (1984). See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 10.12, at 494-497 (6th ed. 1986). Similarly, in *Ex parte Peterson*, 253 U.S. 300, 312-314 (1920), the Court held that the United States District Court for the Southern District of New York had "inherent power" to appoint third persons to take testimony and report to the court. Although the Supreme Court and the lower Article III courts are all "Courts of Law" in which Congress *could* vest authority to appoint "inferior Officers," the Appointments Clause is explicit that appointment power is not inherent, but exists only as "Congress may by Law" confer. See *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816 n.1 (1987) (Scalia, J., concurring in judgment). This Court's longstanding recognition of Article III courts' power to appoint special masters necessarily implies that such special masters are not Officers of the United States subject to the Appointments Clause. By analogy, the Tax Court chief judge's appointment of special trial judges to hear and report on cases under 26 U.S.C. 7443A(b)(4) does not implicate the Appointments Clause.

B. If Special Trial Judges Are Officers, They Are Inferior Officers Whom The Tax Court Chief Judge, As "Head[] of Department[]," May Appoint

If special trial judges are Officers of the United States, they are at most inferior Officers.[26] The Exceptions Clause to the Appointments Clause states that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, Cl. 2. Since Congress has provided by law that the Tax Court "chief judge may, from time to time, appoint special trial judges," 26 U.S.C. 7443A(a), the appointment of the special trial judge who heard petitioners' cases is valid if the chief judge is a "Court[] of Law" or a "Head[] of Department[]."

The validity of the special trial judge's appointment therefore turns on the constitutional status of the Tax Court. As an initial matter, the Tax Court must be located within one of the three Branches of the federal government. The tripartite structure of the Constitution, and this Court's faithful adherence to that organization, admit of no other alternative. *Bowsher* v. *Synar*, 478 U.S. at 721-722; *INS* v. *Chadha*, 462 U.S. at 951; *Buckley* v. *Valeo*, 424 U.S. at 120-124.

1. It is clear that the Tax Court cannot be in the Legislative Branch. Although Congress theoretically could perform some of the Tax Court's functions by enacting private bills in response to the petitions of individual taxpayers, it could do so only by passing laws in conformity with the Bicameralism and Presentment Clauses. See *INS* v. *Chadha*, 462 U.S. at 951. That

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[26] Petitioners' suggestion, Pet. Br. 28 n.26, that special trial judges are principal Officers is fanciful. In *Morrison* v. *Olson*, 487 U.S. at 671, this Court held that an independent prosecutor was "clearly" only an inferior Officer, despite her "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice." Tax Court special trial judges plainly occupy no higher status.

work could not be performed by the Tax Court because legislative power is not delegable: Senators and Representatives could not delegate the power to enact private bills any more than they could "send delegates to consider and vote on bills in their place." *Mistretta* v. *United States*, 488 U.S. 361, 425 (1989) (Scalia, J., dissenting). The notion that the Tax Court may be "an independent judicial body in the legislative branch," Pet. Br. 36 (quoting Office of the Federal Register, Nat'l Archives and Records Admin., *The United States Government Manual* 76 (1989/1990)), must be rejected at the outset as wholly contrary to our system of separated powers.

In fact, the Tax Court does not pass private bills or exercise any other legislative power. Instead, it decides tax controversies between the Commissioner and taxpayers. If the Tax Court were somehow understood to be in the Legislative Branch, the appointment of special trial judges exercising governmental power by the chief judge would plainly violate the Appointments Clause. The very purpose of that Clause is to guard against any intrusion by Congress into the appointments process, beyond the advice and consent role specified in the Constitution.[27] By its terms, the Clause authorizes no legis-

[27] See *Bowsher* v. *Synar*, 478 U.S. at 712-727; *Buckley* v. *Valeo*, 424 U.S. at 129; *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928); The Federalist No. 77, at 518-519 (A. Hamilton) (J. Cooke ed. 1961) ("Every mere council of appointment, however constituted, will be a conclave, in which cabal and intrigue will have their full scope. * * * The example of most of the states in their local constitutions, encourages us to reprobate the idea."); G. Wood, *Creation of the American Republic* 407, 435-436, 452, 551-552 (1969) (granting of appointment powers to state legislatures had been a "principal source of division and faction" in state governments, destroying "all responsibility," creating "a perpetual source of faction and corruption," and, according to Madison, "depart[ing] too far from the Theory which requires a separation of the great Departments of Government").

The Framers were especially anxious to prevent the Legislative Branch from arrogating the power to decide cases. See The Federalist No. 47, at 326 (J. Madison) (J. Cooke ed. 1961) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*." (quoting J. Montesquieu, *The Spirit of Laws* (1748))); 1 W. Blackstone, *Commentaries* *259-260 ("Were [judicial power] joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe.").

lative entity to make appointments. If the Tax Court is such an entity, it can have no power to appoint Officers of the United States.

The fact that Congress amended 26 U.S.C. 7441 in 1969 to provide that the Tax Court was established "under article I of the Constitution," Section 951 of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 730, does not lead to a contrary conclusion. Most of what Congress does is done "under article I of the Constitution." The terms "Article I courts" or "legislative courts" refer not to the status of those entities in the tripartite structure, but rather to the fact that they are not established under Article III.

2. Nor can the Tax Court be located within the Article III Judicial Branch. Although Congress established the Tax Court as "a court of record," Section 951 of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 730, more than that appellation and the function of applying law to fact in particular cases is needed for Article III status. Because tax disputes are "matters, involving public rights, * * * which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper," *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) at 284, and because Congress eschewed life tenure and salary protection for Tax Court judges, the Tax Court cannot be considered part of the Judicial Branch under the Constitution. See U.S. Const. Art. III, § 1; *Glidden*, 370 U.S. at 552 (plurality opinion).

Because the Tax Court is not part of the Judicial Branch, it is not a "Court[] of Law" within the meaning of the Appointments Clause. The Appointments Clause uses the term "*the* Courts of Law" to refer to those courts created and existing under Article III as part of the Judicial Branch. Although so-called Article I courts created by Congress are "courts" in the generic sense of that term, see *Black's Law Dictionary* 358 (6th ed. 1991), the *only* courts expressly provided for by the Constitution are the courts established under Article III. It is most natural to conclude that when the Constitution refers to "the Courts of Law" it is referring to the Courts of Law specified in that document.[28]

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[28] Amicus curiae Erwin N. Griswold argues that the Tax Court "naturally falls within the phrase 'Courts of Law' as the Framers used those words in the Appointments Clause." Amicus Br. 9. His only support for the repeated assertion that the *Framers* thought it "natural," *id.* at 7, 9, 12, 18, to lodge the power to appoint inferior Officers in bodies susceptible to congressional influence, however, is the history of territorial courts appointing their own clerks and commissioners. See *id.* at 12-15. Although the Framers surely understood that the territorial courts functioned as "courts" in the generic sense of that term, it does not follow that territorial clerks and commissioners were "inferior Officers" subject to the Appointments Clause, cf. *Metropolitan R.R.* v. *District of Columbia*, 132 U.S. 1, 7-9 (1889); *Hobson* v. *Hansen*, 265 F. Supp. 902, 919-920 (D.D.C. 1967) (three-judge court) (Wright, J., dissenting), or that territorial courts were "Courts of Law" rather than "Departments" within the Executive Branch.

The only historical evidence on this latter point is the Northwest Ordinance of July 13, 1787. As amended by the First Congress, that law provided that "the President shall nominate, and by and with the advice and consent of the Senate, shall appoint all officers which by the said ordinance were to have been appointed by the United States in Congress assembled." Act of Aug. 7, 1789, ch. 8, § 1, 1 Stat. 53. Among those officers were the three judges of the court for the Northwest Territory. 1 Stat. 51 n.(a). Significantly, the First Congress made provisions for compensating those judges in the Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67-68 (Executive Officers in compensation statute included "the three judges of the western territory"), entitled "An Act for Establishing the Salaries of *the Executive Officers of Government*" (emphasis added), and *not* in the parallel provisions of

Limitation of "the Courts of Law" to Article III courts is more than just consistent with the Constitution's tripartite structure. Structure has purpose. The purpose of the Appointments Clause is to prevent Congress from acquiring executive or judicial power through control over the appointment of Officers of the United States. Permitting appointments by Article III "Courts of Law" is faithful to that purpose: because members of the Judiciary enjoy life tenure and protection against salary reduction, their independence from the Legislative Branch in exercising any appointment authority is guaranteed. Likewise, the President and heads of Executive Departments may act independently of the Congress in the exercise of appointment authority by virtue of the checks and balances accorded the Executive Branch in the constitutional scheme. By contrast, a governmental body neither within the Executive Branch nor protected by Article III would be subservient to Congress. Granting such bodies appointment authority for "inferior Officers" would effec-

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the Act of Sept. 23, 1789, ch. 18, § 1, 1 Stat. 72, providing, *inter alia*, for the compensation of "the judges of the Supreme and other Courts." Cf. Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73-93 (making no reference to territorial courts). It is well established that an Act "passed by the first Congress assembled under the constitution, many of whose members had taken part in framing that instrument, * * * is contemporaneous and weighty evidence of its true meaning." *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

Amicus responds to these Acts of the First Congress by downplaying the importance of their titles. But Congress, unlike the English Parliament, "considers and *passes* the entire act including the title, giving authenticity to every component." 2A Sutherland, *Statutes and Statutory Construction* § 47.03, at 121 (N. Singer rev. of C. Sands 4th ed. 1984); see, *e.g.*, *Mead Corp.* v. *Tilley*, 490 U.S. 714, 722-723 (1989) (resolving ambiguity "by the title" of the legislation); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 388-389 (1959) ("The Title of the Act * * *, though not limiting the plain meaning of the text, is nonetheless a useful aid in resolving an ambiguity."); *Maguire* v. *Commissioner*, 313 U.S. 1, 9 (1941) ("While the title of an act will not limit the plain meaning of the text, it may be of aid in resolving an ambiguity." (citations omitted)).

tively place the power to influence and control such appointments in the Congress itself, thereby violating the fundamental separation of powers concerns underlying the Appointments Clause.[29]

3. If the Tax Court cannot be in the Legislative Branch, and if it cannot be in the Judicial Branch, it must be in the Executive Branch.

a. Given the history of the Tax Court, this conclusion should come as no surprise. In 1924, Congress established the Tax Court's predecessor, the Board of Tax Appeals, as "an independent agency in the Executive Branch of the Government." Section 900 of the Revenue Act of 1924, ch. 234, 43 Stat. 336-338.[30] Congress expanded the Board's adjudicatory role,[31] and in 1942 provided that the

[29] Nor is the Tax Court an adjunct of an Article III court. Cf. *Mistretta* v. *United States*, 488 U.S. at 368, 385 (Sentencing Commission is established "as an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a)); 28 U.S.C. 151 (bankruptcy courts constituted as units of the United States district courts). Tax Court judges are not appointed by any court, but by the President, 26 U.S.C. 7443(b); they are not supervised by any court as regards their internal administration, 26 U.S.C. 7453; and they are not removable by any court, 26 U.S.C. 7443(f). The legislative history of the 1969 Tax Court reform underscores that "[t]he committee amendments do not place the Tax Court under the supervision of the Judicial Conference or the Direction of the Administrative Office of the Article III courts or give them any power or control over the Tax Court." S. Rep. 552, 91st Cong., 1st Sess. 304 n.3 (1969); see S. Conf. Rep. No. 782, 91st Cong., 1st Sess. 341 (1969) (House bill had no provisions concerning Tax Court; conference substitute "follows the Senate amendment").

[30] As originally established, its decisions were not directly reviewable by the courts of appeals and were not finally determinative of the liability in question. Rather, the taxpayer or the government could obtain review by bringing, respectively, a separate suit for a refund or a collection suit with respect to the taxes in issue. See *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 721-722 (1929). Such review was not, strictly speaking, *de novo*, since the statute provided that the findings of the Board would be *prima facie* evidence of the facts.

[31] The Revenue Act of 1926, ch. 27, 44 Stat. 9, provided that the Board's decisions would be directly reviewable by the courts of appeals and, except as modified or set aside on such review, would be finally determinative of the tax liabilities in issue. This procedure remains to this day. *Old Colony Trust Co.*, 279 U.S. at 722. This Court held those procedures constitutional in *Old Colony Trust Co.* and *Phillips* v. *Commissioner*, 283 U.S. 589 (1931).

Board was thereafter to be "known as The Tax Court of the United States," Section 509 of the Revenue Act of 1942, ch. 619, 56 Stat. 957. Notwithstanding those changes, Congress repeatedly continued the Board of Tax Appeals (and later the Tax Court) as "an independent agency in the Executive Branch of the Government." Section 900 of the 1926 Act, ch. 27, 43 Stat. 104; Section 1100 of the 1939 Code, 26 U.S.C. (1952); Section 7441 of the 1954 Code. Thus, for almost a half century, the Board of Tax Appeals and the Tax Court were located explicitly within the Executive Branch.

To be sure, Congress in 1969 removed the language explicitly stating that the Tax Court was an agency in the Executive Branch and substituted language that it was a "court of record" established "under Article I." 26 U.S.C. 7441. But in doing so, Congress did not—and by that action could not—remove the Tax Court from the Executive Branch. Section 7441 itself does not purport to transfer the Tax Court to another branch of government. Contrast 28 U.S.C. 991(a) (establishing Sentencing Commission "in the judicial branch"). It simply describes the status of the Tax Court as a "court" (it applies law to fact) "of record" (it hears disputes on a record) "established under Article I" (most congressional action is pursuant to Article I). The reference in Section 7441 to Article I of the Constitution—far from differentiating the post-1969 status of the Tax Court from its pre-1969 status—actually repudiates the inference that the Tax Court was transferred to the Judicial Branch (Article III). Nor do any of the other reforms affecting the Tax Court suggest such a drastic change. To the contrary, with the exception of giving the Tax Court contempt power, 26 U.S.C. 7456(c), Congress did nothing to change the nature of the Tax Court's role in re-

viewing the Commissioner's determinations of tax deficiencies. See *Burns, Stix Friedman & Co.* v. *Commissioner*, 57 T.C. 392, 401-402 (1971) (Raum, J., concurring).

Indeed, Congress implicitly intended no substantive change in the Tax Court at all, because it continued the incumbent Tax Court judges in office, specifically providing that "[t]he United States Tax Court established under the amendment made by section 951 is a *continuation* of the Tax Court of the United States *as it existed prior to the date of enactment of this Act*, [and] the judges of the Tax Court of the United States immediately prior to the date of enactment of this Act shall become the judges of the United States Tax Court upon the enactment of this Act." Act of Dec. 30, 1969, Pub. L. No. 91-172, Tit. IX, § 961, 83 Stat. 735-736 (emphases added). Congress could not have continued the sitting judges in office, consistent with the Appointments Clause, if it had made such a dramatic change as reconstituting the Court outside the Executive Branch. See *Olympic Federal Savings & Loan Ass'n* v. *Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1191-1193 (D.D.C.), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990). Congress may devolve additional germane duties on existing officers, see *Shoemaker* v. *United States*, 147 U.S. 282, 300-301 (1893), but purporting to establish existing officers in a different branch of government would plainly exceed constitutional limits.[32]

[32] Petitioners suggest that holding the Tax Court to be an Executive Department after 1969 would "override Congress' considered judgment." Pet. Br. 30. Petitioners' only support for this statement, however, is not an Act of Congress but passages in a report prepared by the staff of the Senate Finance Committee. S. Rep. No. 552, *supra*, at 302-304 & n.3. The Finance Committee was apparently misled by the "legislative court" appellation into thinking that Article I courts are part of the Legislative Branch. This Court's decision in *Chadha* makes clear, if it was not clear before, see pp. 33-35, *supra*, that the Tax Court cannot be within the Legislative Branch. The important point is that Congress did not

We readily acknowledge that the Tax Court's fit within the Executive Branch may not be a perfect one. Congress did not seem overly punctilious about precisely where in the tripartite scheme the Tax Court belonged when it amended the statute in 1969,[33] and certain features of the Tax Court's organization—in particular the purported protection of the Tax Court judges from removal, 26 U.S.C. 7443(f)—raise serious constitutional concerns in any executive entity. See *Myers* v. *United States*, 272 U.S. 52, 162-164, 177 (1926). How such provisions should be interpreted, however, and whether they would survive constitutional scrutiny, are not questions before the Court in this case. The question that the Court must confront—if it disagrees with us on the employee status of special trial judges and the waiver point—is the more basic one of which of the three branches is home to the Tax Court. How hospitable a home that branch may turn out to be is a question for the future. For the reasons we have set forth, we think it is basic that (1) the Tax Court cannot be in some headless fourth branch, (2) the Tax Court cannot be part of the Legislative Branch, and (3) the Tax Court is not part of the Judicial Branch. It therefore remains, as it was expressly for nearly a half century, part of the Executive Branch.

Petitioners tellingly fail to explain where in the tripartite system they would place the Tax Court. They have not suggested that it is itself unconstitutional, so they must fix it in one of the three branches. They agree

by statute purport to remove the court from the Executive Branch. Since any such effort would violate the Constitution, such an intent should not be attributed to Congress on the basis of dubious legislative history. Cf. *West Virginia University Hospitals, Inc.* v. *Casey*, No. 89-994 (Mar. 19, 1991), slip op. 14-15.

[33] The legislative history of the 1969 amendments suggests that Congress contradictorily intended both to distance the Tax Court from the Executive Branch *and* to keep it outside the Judicial Branch. See S. Rep. No. 552, *supra*, at 302-304 & n.3.

that it is not part of the Article III Judicial Branch, Pet. Br. 33-34, and cannot quite bring themselves to assert that it is part of the Legislative Branch, *id.* at 36 ("the Tax Court *is considered by many* to be 'a legislative body performing judicial functions,' * * * or 'an independent judicial body in the legislative branch'" (emphasis added)). What they do assert repeatedly is that the Tax Court is "an Article I court," *id.* at 29, without elaborating on the significance of that label. Indeed, it is central to their submission that Congress took action in 1969 "to transform the Tax Court from an executive agency into an Article I legislative court," *ibid.*, but they do not explain how—for separation of powers purposes—an "Article I legislative court" is any different from an executive agency.[34]

b. The Appointments Clause does not say simply that Executive Branch entities may appoint inferior Officers; it specifies that "Heads of Departments" may. The term "Head[] of Department[]" means the chief of any component of the Executive Branch that is not subordinate to (or contained within) another component. Cf. Classification Act of 1923, ch. 265, § 2, 42 Stat. 1488 ("'the head of the department' means the officer or group of officers in the department who are not subordinate or responsible to any other officer of the department"). At the time the Constitution was drafted, "department"

[34] See Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 451 (1989) ("strictly speaking, 'legislative courts' are neither legislative nor courts; rather, they are executive agencies"). Amicus Erwin N. Griswold similarly is content to establish the Tax Court as an Article I court, without explaining what the consequences of such a designation are for the Tax Court's placement in the tripartite system. However many "attributes * * * indicative of a court" the Tax Court may have, Amicus Br. 2, it lacks the key constitutional indicia of an Article III court. Recognizing this fact does not "undervalue" the Tax Court, Amicus Br. 22, because the branches of government are equal and coordinate, rather than arranged in some hierarchical fashion.

meant "Separate allotment; province or business assigned to a particular person." 1 S. Johnson, *A Dictionary of the English Language* (1755). The chief judge is the "Head[]" of the Tax Court, and the Tax Court is a "Department[]" because it is a component of the Executive Branch not contained within any other component.

Petitioners contend that only Officers of cabinet rank are "Heads of Departments." Pet. Br. 30-32 & n.28. The three authorities on which they rely, however, all address the question whether a "Department[]" includes a component of the Executive Branch that is subordinate to or contained within another component of the Executive Branch. Those authorities do not support the much broader proposition that only cabinet members are "Heads of Departments."

Petitioners' first authority is a colloquy between Gouverneur Morris and James Madison on the last working day of the Constitutional Convention. Pet. Br. 32-33. Morris moved to amend the Appointments Clause to provide for the appointment of inferior Officers by the President alone, the Heads of Departments, and the Courts of Law—*i.e.*, what became the Exceptions Clause. Madison objected that the amendment "does not go far enough if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 627 (1966). The amendment carried over Madison's objection on a second vote. *Ibid.* Although the colloquy suggests that Congress cannot vest in an Officer in charge of a component contained within a department the authority to appoint inferior Officers, it does not support petitioners' contention that the head of a free-standing component of the Executive Branch may not be given the power to appoint inferior Officers.

Petitioners' second authority, Pet. Br. 31—this Court's decisions in *United States* v. *Germaine*, 99 U.S. at 510-511, and *Burnap* v. *United States*, 252 U.S. 512, 515

(1920)—likewise hold only that a component of a department is not itself a department whose head is capable of exercising appointment power. Although those cases portrayed departments as "a great division of the executive branch of the Government, like the State, treasury, and War, who is a member of the Cabinet," *Burnap*, 252 U.S. at 515 (relying on *Germaine*, 99 U.S. at 510), the Court's decisions addressed only the situation in which Congress was asserted to have vested authority to appoint an inferior Officer in the chief of a bureau contained within a cabinet department. The Court had no occasion to consider whether entities standing alone are themselves "Departments." See *Germaine*, 99 U.S. at 511 ("The association of the words 'heads of departments' with the President and the courts of law strongly implies that something different is meant from inferior commissioners and bureau officers, who are themselves the mere aids and subordinates *of the heads of the departments*." (emphasis added)); cf. *Burnap*, 252 U.S. at 515 ("It ['[t]he term head of a Department'] does not include heads of bureaus or lesser divisions." (citing *Germaine*)). This Court's characterizations of the Executive Branch "Departments" as being small in number and led by members of the President's cabinet reflected the context in which those cases arose (involving lesser bureaus within a Department) and were simply descriptive of the composition of the Executive Branch of government at the time.[35]

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[35] The cabinet level departments described in *Germaine* and *Burnap* as "Departments" of the Executive Branch were the only departments created by the first Congress. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28 (Foreign Affairs); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (War); Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65 (Treasury); Act of Sept. 15, 1789, ch. 14, § 1, 1 Stat. 68 (renaming Foreign Affairs Department as Department of State).

The first so-called "independent" agency—*i.e.*, independent of other entities in the Executive Branch, emphatically *not* independent of the Executive—was not established until 1887. See Interstate Commerce Act of 1887, ch. 104, § 2, 24 Stat. 379; R. Pierce, S. Shapiro & P. Verkuil, *Administrative Law and Process* 99 (1985). It was not until the 1930s, during President Roosevelt's first term, that such agencies became a significant element in the structure of the Executive Branch. See *id.* at 32-33, 97-101.

Petitioners' third authority consists of definitions used by Congress in unrelated legislation and in committee reports on the Twenty-fifth Amendment. Pet. Br. 30-32. It is true that 5 U.S.C. 101 defines "Executive departments" by means of a list that includes only cabinet departments. But that definition, and the succeeding definitions of "Military departments," "Government corporation," "Independent establishment," and "Executive agency," 5 U.S.C. 102-105, are set forth not for Appointments Clause purposes but for purposes of certain other statutes. See, *e.g.*, 5 U.S.C. 301 (conferring authority to promulgate regulations only on Executive and Military departments); 5 U.S.C. 905(a) (forbidding certain reorganizations involving Executive departments). The fact that the Tax Court may not be covered by these other statutes does not prevent it from being an entity within the Executive Branch for Appointments Clause purposes.

The committee reports on the Twenty-fifth Amendment recognize that "Heads of Departments" includes more than the members of the President's Cabinet. The House of Representatives' original proposal for that Amendment provided for the transfer of the President's power to the Vice President upon the written declaration by the Vice President and a majority of the "heads of the executive departments" that the President was unable to discharge the power and duties of his office. The House of Representatives subsequently amended that language to require written declaration of the President's inability to discharge his duties from a majority of the "Principal officers of the executive departments," rather than from a majority of the "heads of the executive departments," in order "*to make it clearer that only officials of Cabinet rank should participate in the*

decision as to whether presidential inability exists." H.R. Rep. No. 203, 89th Cong., 1st Sess. 3, 15-16 (1965) (emphasis added). There would have been no need to abandon the language under which the written declarations would be provided by the "heads of the executive departments" if that language embraced only members of the President's cabinet.[36]

Petitioners' definition of executive "Department[]" to exclude free-standing components of the Executive Branch is more than just poor semantics. It deprives all non-Article III courts and nearly 50 free-standing agencies of the Executive Branch, see 55 Fed. Reg. 44,196 (1990), of the ability to appoint inferior Officers. Petitioners concede that acceptance of their position will remove appointment authority from all non-Article III courts. Pet. Br. 40.[37] They insist, however, that "all other adjudicatory officers and agents in the federal government are different from Tax Court special trial judges in significant ways." Pet. Br. 38.

But petitioners' conclusion—based on their examination of administrative law judges and staff attorneys of the Securities and Exchange Commission—depends on the remarkable assertion that *all* individuals in agen-

[36] Even if petitioners' interpretation were correct, "Department" may have a different meaning in the Twenty-fifth Amendment than it does in the Appointments Clause, just as its carries a different meaning in the Necessary and Proper Clause, Art. I, § 8, Cl. 18. than it does in the Appointments Clause.

[37] In addition to the Tax Court, non-Article III courts include the original Court of Claims (prior to 1953), *Glidden*, 370 U.S. at 531-532 (plurality opinion); see *Williams* v. *United States*, 289 U.S. 553 (1933); the current Claims Court, 28 U.S.C. 171; the Court of Military Appeals, 10 U.S.C. 941; courts in the District of Columbia, see *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 65 (1982) (plurality opinion); various district courts (*e.g.*, the United States District Court for the Virgin Islands, 42 U.S.C. 1611-1617); and, most recently, the Court of Veterans' Appeals, Act of Nov. 18, 1988, Pub. L. No. 100-687, § 301, 102 Stat. 4113 (codified at 38 U.S.C. 4051).

cies (except their heads) are "employees."[38] Pet. Br. 39. Without painting a bulls-eye on inferior Officers whose appointments would be rendered invalid under petitioners' theory, we think it obvious that between the "employees" and "heads" of agencies are a significant number of inferior Officers. Cf. 3 J. Story, *Commentaries on the Constitution of the United States* § 1538 (1833) ("'inferior officers,' • • • probably includes ninety-nine out of a hundred of the lucrative offices in the government"). Here petitioners meet themselves coming and going. For if inferior Officers include legal assistants who hear and report on tax cases—as petitioners argue in asserting that special trial judges are not mere employees, Pet. Br. 27-28—they surely account for a large number of positions in agencies as well. And their appointments, if made by the heads of those allegedly non-"departmental" components of the Executive Branch, would all be invalid under petitioners' iconoclastic submission.

It is no answer to say, as petitioners do, Pet. Br. 38, that Congress may vest the authority to appoint all inferior Officers in the President alone. That is of course true. But in providing for the appointment of inferior Officers by the Heads of Departments, the Framers anticipated a time when appointment by the President alone of all inferior Officers in the Executive Branch would be inconvenient, if not infeasible. See 2 M. Farrand, *supra*, at 539 ("[Mr. King] did not suppose it was meant that all the minute officers were to be appointed by the

[38] With respect to administrative law judges, that conclusion rests on linguistic sleight-of-hand, Pet. Br. 39 n.37—an irrelevant legislative use of the term "presiding employees" in the Administrative Procedure Act, 5 U.S.C. 554(d), 556(b) and (c), 557(b). See *Buckley* v. *Valeo*, 424 U.S. at 128 n.165 (ignoring Congress's designation of status of Comptroller General as a "legislative officer"). It bears noting that the definition of "Employee" later in Title 5 includes "officers." 5 U.S.C. 2105(a).

* * * original source, but by the higher officers of the departments to which they belong.").[39]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[39] See also H. Storing, *The Complete Anti-Federalist* 2.8.173-176 (1981) (Federal Farmer, No. 14, Jan. 17, 1788) ("We may fairly presume, that the judges, and principal officers in the departments, will be able well informed men in their respective branches of business; that they will, from experience, be best informed as to proper persons to fill inferior offices in them; that they will feel themselves responsible for the execution of their several branches of business, and for the conduct of the officers they may appoint therein.—From these, and other considerations, I think we may infer, that impartial and judicious appointments of subordinate officers will, generally, be made by the courts of law, and the heads of departments.").

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause, Art. II, § 2, Cl. 2, of the United States Constitution, provides in pertinent part as follows:

> He [the President] * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Section 7441 of the Internal Revenue Code (26 U.S.C.) provides as follows:

> **Status**
>
> There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court.

Section 7443A of the Internal Revenue Code (26 U.S.C.) provides in pertinent part as follows:

> **Special trial judges**
>
> (a) **Appointment**
>
> The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court.

(b) **Proceedings which may be assigned to special trial judges**

The chief judge may assign—

(1) any declaratory judgment proceeding,
(2) any proceeding under section 7463,
(3) any proceeding where neither the amount of the deficiency placed in dispute (within the meaning of section 7463) nor the amount of any claimed overpayment exceeds $10,000, and
(4) any other proceeding which the chief judge may designate,

to be heard by the special trial judges of the court.

(c) **Authority to make court decision**

The court may authorize a special trial judge to make the decision of the court with respect to any proceeding described in paragraph (1), (2), or (3) of subsection (b), subject to such conditions and review as the court may provide.

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